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Nos. 87-2068, 88-60, and 88-61

Supreme Court, U.S.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1988

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ALABAMA POWER CO., ET AL., PETITIONERS

v.

LEE M. THOMAS, ET AL.

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OHIO POWER CO. AND ORMET CORP., ET AL., PETITIONERS

v.

LEE M. THOMAS, ET AL.

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NATIONAL COAL ASSOCIATION AND ALABAMA POWER CO.,  
ET AL., PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, ET AL.

---

*ON PETITIONS FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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**BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION**

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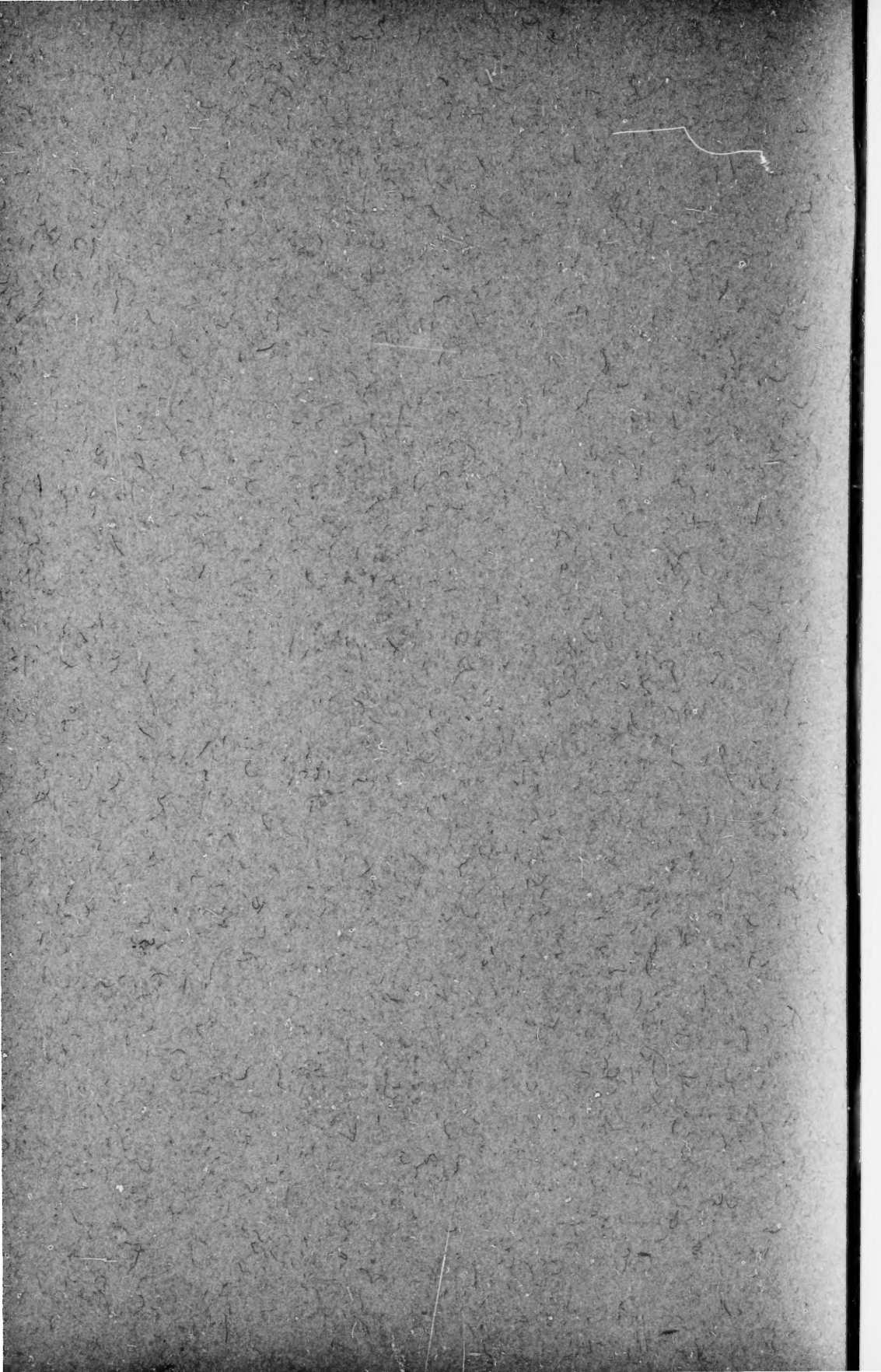
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## QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency (EPA) violated the notice requirement of former Section 4 of the Administrative Procedure Act (APA), 5 U.S.C. 553, when it issued its final rule in these cases (No. 87-2068).

2. Whether the EPA could lawfully require presumptive compliance with a uniform standard without a finding that the standard is attainable by most persons subject to it, where the EPA allows an exception whenever the standard is not attainable (No. 87-2068).

3. Whether the EPA engaged in unlawful retroactive rulemaking by issuing a regulation that applies to future emissions of existing pollution sources (No. 88-60).

4. Whether the court of appeals properly refused to affirm the EPA's decision that certain pre-October 1983 stack height increases to levels below the heights specified by "good engineering practice" formulas need not be justified by demonstrations that they are needed to avoid excessive localized pollution (No. 88-61).

5. Whether the court of appeals violated the doctrines of res judicata and law of the case in requiring the EPA to reconsider its treatment of certain stack height increases (No. 88-61).







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## **OPINION BELOW**

The opinion of the court of appeals (Pet. App. 1a-64a)<sup>1</sup> is reported at 838 F.2d 1224.

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<sup>1</sup> "Pet. App." refers to the appendix to the petition in No. 87-2068.



## JURISDICTION

The judgment of the court of appeals was entered on January 22, 1988. Petitions for rehearing and suggestions of rehearing en banc were denied on April 13, 1988 (Pet. App. 65a-68a). The petition for a writ of certiorari in No. 87-2068 was filed on June 17, 1988, and those in Nos. 88-60 and 88-61 were filed on July 12, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Since enactment of the Clean Air Amendments of 1970 (the Act) (42 U.S.C. (& Supp. IV) 7401 *et seq.*), Congress and the United States Environmental Protection Agency (EPA) have sought to prevent persons who are subject to emission control obligations under the Act from using dispersion of air pollutants as a means of meeting those obligations. Section 123 of the Act, 42 U.S.C. 7423, which was added in 1977, attempts to limit the dispersion of air pollutants by tall stacks. These petitions challenge the decision of the United States Court of Appeals for the District of Columbia Circuit affirming in part and remanding in part the EPA's most recent regulations that were issued to implement Section 123.

A. *Statutory Background.* 1. The basic tools set forth in the Act for reducing and controlling air pollution are the national ambient air quality standards (NAAQS).<sup>2</sup> After the EPA sets the standards for various pollutants, the States must adopt plans that provide for the "implementation, maintenance, and enforcement" of such standards

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<sup>2</sup> The ambient air quality standards are classified as either primary or secondary. Primary standards are those necessary to protect public health. 42 U.S.C. 7409(b)(1). Secondary standards are those necessary to protect the public welfare from any adverse effects that are associated with an air pollutant. 42 U.S.C. 7409(b)(2)



within each air quality control region within the State. 42 U.S.C. 7410(a)(1). Those state implementation plans (SIPs) specify emission limitations and other measures that are necessary to implement the standards, including control requirements for existing pollution sources. Those requirements are supplemented by new source performance standards (NSPS), which are issued by the EPA Administrator under Section 111 of the Act, 42 U.S.C. 7411. NSPS apply both to new facilities and to major modifications of existing facilities, and they reflect "the degree of emission limitation and the percentage reduction achievable through application of the best technological system of continuous emission reduction." 42 U.S.C. 7411(a).

State implementation plans, which are submitted to the EPA for approval, must include emission limitations for sources located within the State, timetables for complying with such limitations, and provisions for any other measures that are necessary to ensure that the applicable air quality standards are attained and maintained. 42 U.S.C. 7410(a)(2)(A). State plans must be revised periodically to take account of revisions of the ambient air quality standards and the availability of improved or more expeditious methods of achieving the standard. The EPA may also require changes if the Administrator finds that the existing plan is substantially inadequate to achieve the standards or to ensure compliance with the requirements of the 1977 Amendments to the Act. 42 U.S.C. 7410(a)(2)(H).

The ambient air quality standards limit local, ground-level concentrations of pollutants. Many regulated sources, however, emit air pollutants through stacks or chimneys. In the absence of any restrictions on their use, taller stacks can be used to disperse pollutants over a wider



area, thus permitting a utility or other source to reduce local ground-level pollution concentrations without actually reducing emissions.

2. Perceiving that regulated sources were opting to raise the height of stacks rather than installing emission controls, Congress added a new Section 123 in 1977. 42 U.S.C. 7423. That Section, which applies to all stacks constructed after December 31, 1970, places restrictions on the use of tall stacks and other dispersion techniques to attain applicable air quality standards. Specifically, Section 123(a) provides that a source cannot receive credit, in calculating its emission limitation, for dispersion from a stack whose height exceeds that prescribed by "good engineering practice." 42 U.S.C. 7423(a).

Under the statute, "good engineering practice" means the height that is necessary to ensure that emissions from the stack do not result in "excessive" ground-level concentrations of pollutants in the immediate vicinity of the source "as a result of atmospheric downwash, eddies and wakes which may be created by the source itself, nearby structures or nearby terrain obstacles (as determined by the Administrator)." 42 U.S.C. 7423(c). That height is presumed not to exceed two and one-half times the height of the source ( $2.5H$ ) (42 U.S.C. 7423(c)), which is generally referred to as "formula height" (see, *e.g.*, Pet. App. 10a). Under the statute, however, a source may qualify for greater than formula height if its owner or operator demonstrates to the satisfaction of the EPA that a greater height is necessary to avoid "excessive concentration" in the immediate vicinity. 42 U.S.C. 7423(c).

To make the specified showing of need to exceed formula height, an owner or operator generally conducts a fluid modeling demonstration, in which the effects of the source, nearby structures and terrain, and atmospheric conditions are simulated in a wind tunnel. In that way, it is



possible to predict the effect of a source on air quality prior to construction of the stack. Where the required demonstration is made, the statute allows the EPA to approve credits for stack heights above formula height. As the House Report accompanying the 1977 legislation states, however, "the latitude given the Administrator to allow full credit for such stack height will be exercised with circumspection and utmost caution in those rare circumstances proven to justify its use." H.R. Rep. 95-294, 95th Cong., 1st Sess. 93 (1977).<sup>3</sup>

B. *Regulatory History*. 1. The EPA first proposed regulations under Section 123 on January 12, 1979. Finding that the statutory formula of  $2.5H$  overestimated "good engineering practice" stack height for some sources, the Agency proposed a second and more restrictive formula for prospective application based on the height of the source plus one and one-half the lesser of the height or width ( $H + 1.5L$ ). 44 Fed. Reg. 2610, 2614. A source seeking greater stack height credit than accorded under the applicable formulas could demonstrate, through the use of an actual field study or a fluid model, that greater height was necessary "to ensure that emissions from the stack do not result in excessive concentrations of any air pollutant in the immediate vicinity of the source" (*id.* at 2614). The regulation defined "excessive concentrations" generally to mean concentrations that (a) are at least 40% more than the concentrations that would exist if there were no downwash, wakes, or eddy effects caused by nearby structures or terrain (*ibid.*) and (b) exceed either the ambient air

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<sup>3</sup> The Report also recognizes that the need for extra stack height is most pronounced for sources that are located in hilly or rugged terrain. The Report states: "[i]t is the expectation of this committee that persons responsible for siting new facilities will not locate them next to terrain features which will produce such downwash." H.R. Rep. 95-294, 95th Cong., 1st Sess. 93 (1977).



quality standards or, in the case of sources subject to the Prevention of Significant Deterioration (PSD) program (40 C.F.R. 51.24 (1985); 40 C.F.R. 52.21), the permitted PSD increment.<sup>4</sup>

In response to comments on the 1979 proposed regulations, the EPA issued a revised proposal on October 7, 1981. That proposal, among other things, modified the definition of "excessive concentrations" to delete the requirement that a source demonstrate that an ambient air quality standard or PSD increment was exceeded before the source could qualify for stack height credit above that provided by the formula. 46 Fed. Reg. 49816. Under the revised proposal, a source was required only to demonstrate a 40% increase in pollutant concentrations in order to qualify for greater than formula credit.

The EPA promulgated final regulations under Section 123 on February 8, 1982. 47 Fed. Reg. 5864. Those regulations adopted the agency's refined good-engineering-practice formula of  $H + 1.5L$ , but they allowed sources that commenced construction of stacks prior to January 12, 1979, the date the formula was first proposed, to retain credit based on the more lenient  $2.5H$  formula. *Id.* at 5866, 5868. The final regulations also retained the 1981 definition for excessive concentrations. *Id.* at 5868-5869. Neither the 1982 final regulation, the 1979 proposal, nor the 1981 proposal specified any emission level to be used in carrying out the Section 123 fluid modeling demonstrations.

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<sup>4</sup> PSD increments apply in areas that have attained the air quality standards established by Section 109 of the Act, 42 U.S.C. 7409. See 42 U.S.C. 7471-7479. They set the amount of increased emissions permitted in such areas and are aimed at limiting the air quality deterioration in such an area even if the standard itself may not be threatened.



2. The United States Court of Appeals for the District of Columbia Circuit affirmed in part, reversed in part, and remanded for the EPA to reconsider certain portions of the regulations. *Sierra Club v. EPA*, 719 F.2d 436 (1983), cert. denied, 468 U.S. 1204 (1984). No party to that litigation challenged the EPA's adoption of the refined  $H + 1.5L$  formula. Sierra Club, the Natural Resources Defense Council (NRDC), and the Commonwealth of Pennsylvania, however, challenged the agency's decision to permit sources that commenced construction of their stacks prior to the date the new formula was proposed to retain credit based on  $2.5H$ . The court generally affirmed the agency's decision to "grandfather" that category of sources, but it remanded the regulation to the agency with directions to limit the grandfathering benefit to sources that actually relied on the  $2.5H$  formula in constructing their stacks. 719 F.2d at 468.

Petitioners in *Sierra Club* also challenged the agency's decision not to require any demonstration of need—that is, of the need for a particular stack height in order to avoid excessive localized pollution—by owners or operators of sources that increased the height of existing stacks up to, but not exceeding, formula height. The court found that the EPA had not adequately evaluated the presumption that existing stacks were originally built to the height prescribed by good engineering practice. It therefore remanded for the EPA "to reconsider whether, in light of its new understanding of 'excessive concentrations,' demonstrations are necessary before stack heights may be raised, even if the final height will not exceed formula height." 719 F.2d at 459-460.

Finally, the court remanded for reconsideration of the EPA's definition of "excessive concentrations," ruling that the agency had erred in failing to relate the definition to some level of air pollution that could be deemed to en-



danger health and welfare. 719 F.2d at 450. The court expressed its approval of the definition originally proposed by the EPA in 1979, which would have required a source owner or operator to show an "exceedance" of an air quality standard or PSD increment as well as a percentage increase in pollutant concentrations before credit could be awarded for stack height that exceeded formula height. *Id.* at 468.

3. In response to the court's remand, the EPA published proposed regulations on November 9, 1984. 49 Fed. Reg. 44878. The agency reformulated its definition of "excessive concentrations" as it applied to fluid modeling demonstrations that are conducted for the purpose of qualifying for above-formula stack height credit. In brief, the EPA repropoed the definition set forth in its 1979 proposed regulations and required sources to demonstrate both a 40% increase in local pollutant concentrations and the exceedance of an ambient air quality standard or PSD increment. *Id.* at 44887.

Having reintroduced into the definition of "excessive concentrations" the absolute levels of localized pollution, the agency also stated for the first time its intention to prescribe specific emission limitations to be used in performing the fluid modeling demonstrations. As the court of appeals later explained (Pet. App. 14a-15a), ground-level concentrations are a function of both stack height and emission levels, and therefore, in order to determine the stack height that is needed to ensure that ground-level concentrations do not exceed specified levels, one needs first to specify an emission level: the higher the emission level, the greater the stack height required for ground-level concentrations to be reduced to a given level.<sup>5</sup> The EPA

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<sup>5</sup> A higher *assumed* emission level means a greater stack height, which means a greater credit, which in turn means a higher *permitted* emission rate. Hence, to maximize the permitted emission rate one



proposed the emission levels to be used in the modeling as follows (Pet. App. 150a):

[I]t will be necessary to specify an emission rate \* \* \* in order to determine whether a NAAQS or PSD increment is being exceeded. Consequently, the Agency will require in its technical support document that the emission limitation be established based on either: (1) The existing, approved emission limit; (2) any applicable technology-based emission limit, such as the new source performance standards (NSPS); or (3) the emission limit that would result from the use of GEP formula stack height, whichever is applicable to the source being modeled.<sup>6</sup>

In response to comments, the EPA eliminated two of the three emission levels set forth in the November 1984 notice of proposed rulemaking. The final regulation thus requires that a source seeking to justify extra stack height perform its fluid modeling demonstration using the emission rate prescribed by the NSPS applicable to that source category unless the owner or operator demonstrates that the NSPS emission limit cannot feasibly be met. Pet. App. 96a. The agency explained (*ibid.* (footnote omitted)):

The EPA believes that in cases where greater than formula height may be needed to prevent excessive con-

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would seek to maximize the assumed emission level in the modeling; lower assumed levels correspond with lower permitted pollution rates.

<sup>6</sup> Petitioners observe (87-2068 Pet. 6-7) that fluid modeling demonstrations that were conducted in the late 1970s and early 1980s used the sources' actual or allowable emission levels in calculating expected ground-level pollution concentrations from particular stack heights. Nevertheless, the 1982 final regulation, the 1979 proposal, and the 1981 technical guidelines cited by petitioners all were silent on whether such use was proper. The issue was not addressed by the EPA until November 1984.



centrations, sources should first attempt to eliminate such concentrations by reducing their emissions. For this reason EPA is requiring that the emission rate to be met by a source seeking to conduct a demonstration to justify stack height credit above the formula be equivalent to the emission rate prescribed by NSPS applicable to the industrial source category. In doing this, EPA is making the presumption that this limit can be met by all sources seeking to justify stack heights above formula height. Sources may rebut this presumption, establishing an alternative emission limitation, on a case-by-case basis, by demonstrating to the reviewing authority that the NSPS emission limitation may not feasibly be met, given the characteristics of the particular source.

The agency also explained that it rejected the option of allowing a source to use its actual emission limit because "to the extent that limit relied on greater than formula height, it would amount to using a tall stack to justify itself" (*id.* at 97a).

Several owners and operators of sources had previously performed fluid modeling demonstrations for the purpose of qualifying for above-formula stack height credit.<sup>7</sup> Ac-

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<sup>7</sup> For example, Ohio Power Company, a petitioner in No. 88-60, had completed a fluid modeling demonstration for its Kammer Power plant in West Virginia. Ohio Power had commenced construction of its Kammer stack in the mid-1970s. The enactment of Section 123 in 1977 jeopardized Ohio Power's ability to receive credit for the new stack. Accordingly, Ohio Power, in consultation with the EPA, conducted a fluid modeling demonstration under the 1979 proposed regulations. That demonstration was tentatively approved by the agency on August 17, 1982. 47 Fed. Reg. 35784. A mid-level employee of the EPA subsequently sent a letter indicating that the demonstration had been found consistent with the 1982 final regulations. 88-60 Pet. 12; C.A. App. 152. Although the August 17, 1982, notice had an-



cordingly, the agency had to decide, based on the court of appeals' decision in *Sierra Club*, whether those sources should be permitted to retain the extra credit under a grandfathering provision or should instead be required to perform fluid modeling demonstrations under the new regulations. The agency decided not to grandfather that category of sources. It explained (Pet. App. 99a):

EPA is making this part of the regulations retroactive to December 31, 1970. In the terms of the court's retroactivity analysis, stacks greater than formula height represent a situation that Congress did affirmatively "intend to alter" in section 123. Moreover, EPA regulatory pronouncements since 1970 have placed a stricter burden on sources raising stacks above formula height than on others.

As required by the court of appeals' remand order, the EPA also considered whether demonstrations should be required for owners and operators of sources who increased existing stacks up to formula height. The agency adopted a new regulation that requires fluid modeling demonstrations in such circumstances, but only where the height of existing stacks was increased up to formula height after October 11, 1983, the date of the *Sierra Club* decision. Pet. App. 100a-103a, 132a. The agency explained the grandfathering of pre-*Sierra Club* increases by observing that the court of appeals' requirement of demonstrations for within-formula stack height increases was a significant departure from prior agency policy and regulatory proposals. Hence, there was little reason prior to the court of appeals' decision in *Sierra Club* to an-

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ticipated that the results of the fluid modeling demonstration would be the basis for a state plan revision authorizing a relaxed emission rate for the Kammer plant, such a revision was never approved by the agency.



ticipate that credit for such an increase—up to the 2.5H formula height before 1979, and up to the  $H + 1.5L$  formula height for increases commenced between January 12, 1979, and October 11, 1983—would not be forthcoming without a demonstration. Pet. App. 102a-103a. The agency decided, however, that States would remain free to require a fluid modeling demonstration (or field studies) for within-formula height increases if they believed that application of the formulas overestimated good engineering practice stack height. *Id.* at 103a-108a.

*C. The Opinion Below.* Industry petitioners challenged the agency's decision to establish a presumption that the NSPS emission limitations were the proper ones to assume in conducting fluid modeling demonstrations to justify credit for above-formula stack height. They asserted that the EPA failed to provide notice as required by former Section 4 of the Administrative Procedure Act (5 U.S.C. 553), and that it had not developed a record to support the presumption that NSPS could be met for all sources. In addition, certain industry petitioners challenged the EPA's decision not to exempt from the new demonstration requirements sources that had qualified for above-formula stack height credit under prior agency policies. The court of appeals rejected those arguments.

As to the notice-and-comment argument, the court stated that the EPA "can obviously promulgate a final regulation that differs in some respects from its proposed regulation" and that the agency's "final rule must only be a 'logical outgrowth' of its proposed rule" (Pet. App. 32a (citation omitted)). The court found that that standard was met (*id.* at 32a-34a). First, it noted that the agency's proposed rule in November 1984 included the NSPS limit as one of the alternatives that would be applicable to some sources. Second, it pointed out that the idea that even-



tually led the EPA to choose that option, and to reject the use of existing emission limits or the limits that would result from use of the GEP formula, was one that at least one of the rulemaking participants, the NRDC, vigorously pressed on the agency from the outset—that polluters should “control first” and only afterwards be permitted to resort to dispersion by increasing stack height.<sup>8</sup> Third, the court found that public comments on the proposed rule expressly urged the agency to adopt, and thereby put others on notice that it might adopt, a single technology-based limit. Finally, the court observed that at least some of the industry petitioners were given actual prior notice of the substance of the final rule, and they therefore had a limited opportunity to focus a direct attack on the NSPS presumption, as they did.

As to the objection that the “NSPS presumption” lacked record support, the court of appeals concluded (Pet. App. 30a-31a) that the EPA need not establish a record that NSPS are attainable by most affected sources. The court explained: “as EPA allows any source to use a higher emissions rate when NSPS is infeasible, there is no need for any sort of generic demonstration that it is normally [feasible]” (*id.* at 30a). It further explained that the EPA’s decision to set a relatively uniform and low presumptive baseline emission limit for use in the Section 123 demonstrations, and to place the burden of showing infeasibility on the source owner, was consistent with Con-

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<sup>8</sup> The court explained that the NSPS option chosen by the EPA “is, of course, a variant of control-first” (Pet. App. 17a). It further explained that, in selecting that option, the EPA rejected the existing-limit option because use of that limit could lead to “‘using a tall stack to justify itself’” (*id.* at 23a (quoting *id.* at 97a)). The court also observed (*id.* at 33a) that no party before it advocated the formula-level option originally articulated in the November 1984 proposed rule.



gress's intent that credit for extra stack height be approved only in " 'rare circumstances' " (Pet. App. 30a-31a (quoting H.R. Rep. 95-294, *supra*, at 93)).

The court of appeals also concluded (Pet. App. 35a, 45a-50a) that the agency did not abuse its discretion in deciding not to grandfather sources that performed fluid modeling demonstrations to justify above-formula stack height under prior agency policy and regulations. The court first found that the decision in *Georgetown University Hospital v. Bowen*, 821 F.2d 750 (D.C. Cir. 1987), cert. granted, No. 87-1097 (Feb. 29, 1988), did not apply in this case. That decision, the court explained (Pet. App. 35a), invalidated as retroactive a rule that would have limited reimbursements for past transactions. The rule at issue in this case applies only to future conduct, namely, a source's future emissions.

The court then applied the retroactivity analysis that it had articulated in its decision in *Sierra Club*, concluding (Pet. App. 36a) that "the issue entails a balancing of the interest in prompt and complete fulfillment of statutory goals against the inequity of enforcing a new rule against persons that justifiably made investment decisions in reliance on a past rule or practice." The court found that the agency had relied on the importance of the statutory goal and on its view that Congress in Section 123 intended affirmatively to alter industry reliance on above-formula stack heights (Pet. App. 49a). The court recognized that source owners that had conducted fluid modeling demonstrations in the past had valid reliance interests—though those were tempered somewhat by the fact that "regulatory pronouncements since 1970 had consistently placed a higher burden on credits for above-formula stacks" (*ibid.*)—and might have an equitable argument for grandfathering if they could demonstrate that the new requirements would impose a heavy economic



burden (*ibid.*). Because the NSPS presumption could be rebutted by a showing of infeasibility, however, those source owners would “have an opportunity to identify the[ir] costs and secure such relief as their size may justify” (*id.* at 50a).<sup>9</sup> The court accordingly found that the agency did not abuse its discretion in deciding not to grandfather sources that had performed modeling demonstrations and increased their stacks to above-formula heights.

Finally, the court rejected various other challenges, including a challenge to the sufficiency of the agency’s requirement of demonstrations for justifying within-formula stack height increases (Pet. App. 24a-28a). In particular, several environmental groups and States challenged the EPA’s decision to grandfather within-formula stack height increases commenced prior to the date of the court’s opinion in *Sierra Club*. The court of appeals remanded for reconsideration of that decision, ruling (Pet. App. 36a-40a) that the EPA had not adequately considered the degree of reliance on fluctuating agency policy and therefore had not adequately supported its conclusion that grandfathering of this category of stacks was appropriate. The court stated (*id.* at 40a): “We do not say there is no room for grandfathering on these facts, but the case for it seems unusually weak. Any grandfathering chosen should fit, to a reasonable degree, the variations in regulatory history and degrees of reliance.”

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<sup>9</sup> The court observed (Pet. App. 50a) that “the only sunk cost that is directly wasted by the new regulations is the cost of the [modeling] demonstrations themselves” and that, while those costs might not be negligible in some cases, it would be “a rare case where the costs of securing data could alone entitle a party to grandfathering.”



## ARGUMENT

1. Petitioners contend (87-2068 Pet. 16-23) that the EPA violated former Section 4 of the Administrative Procedure Act (5 U.S.C. 553) by giving inadequate notice prior to promulgation of its final rule that source owners would presumptively have to use NSPS as the assumed emission level in conducting fluid model demonstrations to qualify for stack height credit above that prescribed by the formula. The court of appeals correctly rejected that claim (Pet. App. 31a-34a). The ruling raises no issue that warrants this Court's review.

Petitioners received the notice to which APA Section 4 entitled them. See 5 U.S.C. 553(b)(3) (a notice of proposed rulemaking must convey "either the terms or substance of the proposed rule or a description of the subject and issues involved"). A final rule may, of course, differ in some respects from the initial proposal: the very point of comments is to promote consideration of changes. See *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1103-1104 (4th Cir. 1985); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973). For example, an agency may eliminate several alternatives discussed in a notice of proposed rulemaking even if the result is to make the final rule more stringent than the proposal. See *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 533 (D.C. Cir.) cert. denied, 459 U.S. 835 (1982). More generally, notice is adequate if the changes in the original proposal are in character with the original scheme, and the final rule is a logical outgrowth of the notice and comment previously given. See, e.g., *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979), cert. denied, 444 U.S. 1096 (1980); *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d at 1105. Those standards were met here.



The changes adopted in the final rule were in character with the original scheme. The November 1984 notice of proposed rulemaking identified the NSPS limit as one of the three emission rates that the EPA proposed would be applied to various affected sources. All of the rulemaking participants were aware that one of the issues to be addressed in the rulemaking was the emission limit to be used in fluid modeling demonstrations; indeed, the agency could not do otherwise, for, as we explained above, such a limit is an essential element of a meaningful demonstration. The parties to the rulemaking were also aware that at least two of the principal participants in the process, Sierra Club and NRDC, were vigorously promoting the idea that pollution sources should have to exhaust their ability to control emissions before being permitted higher stacks—an idea that, in the context of the modeling issue, pointed clearly toward adoption of the NSPS limit, which was the most stringent of the three standards originally proposed.<sup>10</sup> Even more specifically, various public comments expressly promoted adoption of a single technology-based limit (such as NSPS) for all sources, including those whose owners were performing Section 123 fluid modeling demonstrations (Pet. App. 33a). The agency responded to all of the rulemaking comments by

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<sup>10</sup> As the court of appeals explained (Pet. App. 33a), no party advocated the formula-level option, and the existing-level option was rejected essentially on control-first grounds. The objection to using existing limits was that doing so could lead to a ratcheting up of permissible stack height. An existing emission level could justify an increase in stack height as necessary to avoid excessive ground-level pollutant concentrations. That would in turn justify a credit on emission levels that would then justify an increased emission level. The new higher emission level could then be used to justify a higher stack height, and so on. A uniform technology-based limit was needed to forestall that result, which would frustrate the purpose behind Section 123.



eliminating the two alternatives to the NSPS limit (*id.* at 34a). That response, which was firmly based on the congressional policy that above-formula stacks should be permitted only in "rare circumstances" (H.R. Rep. 95-294, *supra*, at 93), introduced no novel or unexpected principles into the proceeding; rather, it was a logical outgrowth of the original proposal.<sup>11</sup>

Contrary to petitioners' suggestion (87-2068 Pet. 17-18), the decision of the court of appeals does not conflict with the principles articulated by the Fourth Circuit in *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d at 1102-1105. The Fourth Circuit there recognized that an agency may promulgate a final rule that is different from its proposal (*id.* at 1103-1104), that notice is adequate if the changes in the original proposal are in character with the original scheme and a logical outgrowth of the comments received (*id.* at 1105), and that application of those principles in a particular case is an inherently fact-intensive undertaking (*id.* at 1104). See also *E. I. du Pont de Nemours & Co. v. Train*, 541 F.2d 1018, 1026 (4th Cir. 1976), *aff'd* in part and *rev'd* in part, 430 U.S. 112 (1977) ("Notice is sufficient if it provides a description of the subjects and issues involved."). The court in *Chocolate Mfrs. Ass'n* found that, considering all the circumstances, the proposed rule was not "sufficiently descriptive to provide interested parties with a fair opportunity to comment and to participate in the rulemaking" (541 F.2d at 1104): first, neither the proposed rule itself nor the history of the issue in the agency

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<sup>11</sup> In addition, as the court of appeals pointed out (Pet. App. 31a, 33a), certain of petitioners received actual notice of the EPA's intention to adopt the NSPS presumption two weeks before promulgation of the final rule, and they had an opportunity directly to attack the NSPS rule at least one week before the final rule was issued.



nor the preamble discussion furnished fair warning that the position eventually adopted in the final rule would even be considered (*id.* at 1106-1107); and, indeed, the final rule, which banned flavored milk, was exactly the opposite of the original proposal, which banned other products but listed flavored milk as part of a permissible diet (*id.* at 1103). The court of appeals in the present cases applied the same principles and correctly found, on entirely different facts, that the notice of proposed rulemaking, considering all the circumstances, accorded petitioners a fair opportunity to urge the agency not to adopt a single technology-based emission limit, such as the NSPS, for use in modeling demonstrations.

2. Petitioners contend (87-2068 Pet. 23-27) that the court of appeals erred in sustaining the EPA's adoption of the NSPS presumption in the absence of a technical record establishing that NSPS can be met by most sources. To the extent that petitioners suggest that the EPA made a factual finding that most sources can meet the NSPS, that suggestion is incorrect: the EPA merely "ma[de] the presumption that this limit can be met by all sources seeking to justify stack heights above formula height," while allowing any source owner to show the infeasibility of meeting the NSPS (Pet. App. 96a). Hence, there was no factual finding that required record support.

All that the EPA did was to allocate a burden of proof to those seeking credit for stack heights above the good engineering practice formula heights. It merely required such source owners to prove that they cannot feasibly meet the NSPS emission-control limit, and should therefore be able to use a higher limit in their modeling demonstrations, in order to justify a taller stack for greater dispersion of pollutants. As the court of appeals held, the EPA's ruling in this regard is entirely reasonable and is consistent with the obvious congressional policy that sources seeking



above-formula stack height must carry a heavy burden of justification. Pet. App. 30a-31a.<sup>12</sup>

Petitioners incorrectly assert (87-2078 Pet. 26) that the court of appeals' decision on this point conflicts with the ruling of the Fourth Circuit in *E. I. du Pont de Nemours & Co. v. Train*, 541 F.2d at 1028. That ruling is irrelevant to this case: it does not address what record support is required for a regulation that is expressly promulgated to establish a rebuttable presumption of the feasibility of a technological level of pollution control. Rather, the ruling in the case was simply that EPA effluent-limitation regulations under the Clean Water Act establish neither uniformly applicable standards that must be included in every water-pollution permit nor mere guidelines for the permit issuers but presumptively applicable permit conditions. 541 F.2d at 1027-1028.

3. Petitioners contend (88-60 Pet. 9-15) that the EPA violated an Administrative Procedure Act proscription on retroactive rulemaking in determining that all post-1970 sources must comply with the demonstration requirements announced in this rulemaking proceeding in order to obtain credit for above-formula stack heights. They also contend (*ibid.*) that the court of appeals, in affirming the agency's requirement, departed from its earlier holding in *Georgetown University Hospital v. Bowen*, *supra*, which generally bars retroactive rulemaking. Petitioners are wrong on both counts.

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<sup>12</sup> Contrary to petitioners' suggestion (87-2068 Pet. 23-24), the fact that the EPA must make a record to support the factual findings necessary to establish NSPS under Section 111 of the Act, as it has done in that context, does not suggest that a similar record is required where, as here, the agency has merely allocated a burden of proof and not made any factual findings.



The court of appeals correctly pointed out (Pet. App. 35a) the obvious distinction between *Georgetown University Hospital* and these cases. The rule at issue in that case would have limited monetary reimbursements for past transactions. The rule here governs only future conduct. Source owners who conducted fluid modeling demonstrations in the past may have to reduce their future emissions to comply with the requirements of the new regulation, but the EPA regulation does not recoup past benefits, and sources that qualified for extra stack height credit under earlier regulations suffer no penalty stemming from their past emissions. Indeed, petitioner Ohio Power has obtained considerable economic benefits from its extra stack height since its Kammer Plant stack became operational in 1979. The EPA regulation means only that Ohio Power may not continue to enjoy that credit, and thus emit the additional pollutants the credit would permit, in the future. In short, nothing in the EPA's regulation declares that any of petitioner's past conduct was unlawful or seeks to impose liability based on that conduct: the regulation applies equally to all who engage in the covered conduct in the future, regardless of their past behavior.<sup>13</sup>

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<sup>13</sup> Contrary to petitioners' contention (88-60 Pet. 13 n.29), the court of appeals' decision in this case is no more contrary to *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 879-881 (D.C. Cir. 1979), which could not in any event create an intercircuit conflict, than it is to *Georgetown University Hospital*. The *Citizens* case involved the application of an EPA regulation to construction projects commenced prior to issuance of the regulation, where the regulation required *preconstruction* review: it prohibited construction itself unless certain conditions were met. Accordingly, that regulation, unlike the regulation at issue here, by its terms applied to past conduct and declared that the conduct had been unlawful at the time it took place.



For those reasons, the court of appeals correctly concluded that the retroactive-rulemaking bar articulated in *Georgetown University Hospital* does not apply in this case.<sup>14</sup> The court of appeals recognized, however, that, when a regulation may diminish the value of past investments or upset reliance interests, its validity under arbitrary-and-capricious or abuse-of-discretion review depends on a balance of "the interest in prompt and complete fulfillment of statutory goals against the inequity of enforcing a new rule against persons that justifiably made investment decisions on a past rule or practice" (Pet. App. 36a). The court correctly concluded that the regulation was valid under that standard.

On one side of the balance, the main statutory goal in these cases, of course, is that expressed by Congress when it declared in 1977 that the Section 123 demonstration requirements would apply to all post-1970 sources whose owners wish to receive credit for above-formula stacks (Pet. App. 49a). In addition, the Clean Air Act plainly contemplates and requires that emission control requirements may be altered and made more restrictive—e.g., by rulemaking or alteration of a state plan—when statutory or regulatory requirements change or when existing requirements prove inadequate to attain the ambient air quality standards. See 42 U.S.C. 7410(a)(2)(H). In those ways, the Act substantially undermines any claim that a source owner may seek reliance-based protection against agency changes of valid pollution-control measures<sup>15</sup> and demonstrates congressional recognition

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<sup>14</sup> Because the cases do not present the same issues, the petition for a writ of certiorari in No. 88-60 should not be held pending the Court's disposition of *Georgetown University Hospital v. Bowen*.

<sup>15</sup> The decisions cited by petitioners (88-60 Pet. 12 n.27) do not support the contrary premise. In *American Methyl Corp. v. EPA*, 749



of a broad need to subject already-existing pollution sources to current requirements. Those considerations weigh heavily in any balance involving the proper treatment of claims of reliance on pre-1984 EPA regulations, which, moreover, were known all along not to be final.<sup>16</sup>

On the other side of the balance, the court of appeals observed (Pet. App. 49a) that source owners who performed fluid modeling demonstrations in the past may have relied on agency guidance in doing so and that, under some circumstances, those source owners might have an equitable argument for grandfathering.<sup>17</sup> The court of

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F.2d 826 (1984), vacated on other grounds, 768 F.2d 385 (D.C. Cir. 1985), cert. denied, 474 U.S. 1082 (1986), for example, the court did not find, as petitioners suggest, that the EPA had no authority to revoke a previous decision. Rather, the court of appeals held that the EPA had failed to follow the revocation procedures prescribed by statute. In *Utah Int'l, Inc. v. Andrus*, 488 F. Supp. 976 (D. Colo. 1980), the district court refused to permit the government to reopen a case based on a change in administrative policy. In the present case, the EPA revised its regulation at the direction of the court of appeals, which found that the agency's prior approach did not implement congressional intent.

<sup>16</sup> As the EPA argued to the court of appeals, its approval of the fluid modeling demonstration for Ohio Power's Kammer Plant was not an adjudication but part of its rulemaking function. The fluid modeling demonstration for Kammer has no significance that is independent of the emission limitation and control strategy applicable to that plant. See C.A. App. 334. Those limitations and strategies are imposed through rulemaking under Section 110 of the Act. 42 U.S.C. 7410(c). The Federal Register notice that tentatively approved the Kammer demonstration explicitly stated that a request for a state plan revision was expected. 47 Fed. Reg. 35784 (1982). But the agency never approved any revision for the Kammer plant. See Gov't C.A. Br. at 23-25, *Ohio Power v. Thomas*, No. 86-1331.

<sup>17</sup> Petitioners incorrectly state (88-60 Pet. 12 & n.26 (quoting Pet. App. 35a)) that the court of appeals found that the regulation "would impinge unfairly on source owners that made investments or other



appeals concluded, however, that, whatever the precise reliance interests and however they may weigh in the balance in particular cases, petitioners have not shown that the regulation will impose a substantial burden on them (*id.* at 50a). The court found that each source owner with a reliance claim can make the claim in the course of rebutting the NSPS presumption by showing that the NSPS are infeasible: the opportunity to rebut that presumption provides "each source owner \* \* \* an opportunity to identify the[ir] costs and secure such relief as their size may justify" (*ibid.*).<sup>18</sup> Hence, the rule at issue incorporates a mechanism for individualized consideration of reliance interests and cannot be found invalid on the ground that it overrides or impairs such interests.

4. Petitioners challenge (88-61 Pet. 16-22) the court of appeals' application of a demonstration requirement to sources whose stacks are raised to levels up to the good

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commitments in reasonable reliance on prior understandings.' " To the contrary, the court of appeals recognized only that the regulation *might* have such an effect; it then found that the source owner's ability to demonstrate that the new requirements could not feasibly be met would protect the owners from any undue burden (Pet. App. 49a-50a).

<sup>18</sup> In the case of Ohio Power's Kammer Plant, the reliance interest would seem to be slight. Ohio Power commenced construction of its Kammer Plant stack in 1976, which was prior to enactment of the 1977 Clean Air Act Amendments. Its subsequent fluid modeling demonstration was an attempt to qualify that stack for good engineering practice credit after the fact. Thus, Ohio Power did not rely on agency guidance in constructing its stack. It may, however, have relied on its ability to retain credit for the stack in negotiating its current fuel contract. That issue was not addressed in the rulemaking, and there is accordingly no record on any such claim. Nor did the court of appeals address that question. In any event, like all claims of reliance interests, the issue is appropriately addressed in individual cases if and when Ohio Power claims that it cannot feasibly meet an NSPS emission limitation.



engineering practice formula levels. To the extent that petitioners contend that the court of appeals erred in *Sierra Club* in reversing the EPA's determination that no such requirement applies to within-formula increases (as opposed to above-formula increases), the issue does not merit this Court's review. When *Sierra Club* was decided, the EPA, which is the agency whose interpretation of the Clean Air Act was invalidated, decided not to seek review in this Court. The issue was raised in an industry petition for a writ of certiorari (No. 83-1429); the EPA stated in response that the petition should not be granted, as the agency would seek to comply with the remand order in such a way as to minimize regulatory burdens; and this Court denied certiorari. 468 U.S. 1204 (1984). The court of appeals in the present cases, in holding that the EPA's grandfathering of pre-*Sierra Club* within-formula stack increases was inadequately supported, implicitly relied on the *Sierra Club* principle that demonstration requirements may apply to within-formula stack increases; the EPA has again determined that review by this Court is not warranted and has therefore not filed a petition for a writ of certiorari. The EPA intends to proceed in accordance with the remand order. The correctness of *Sierra Club*'s rejection of the EPA's interpretation of Section 123 does not warrant this Court's review now any more than it did in 1984.

To the extent that petitioners complain separately about the court of appeals' refusal to sustain the EPA's decision to grandfather all within-formula stack height increases commenced prior to October 11, 1983, petitioners have again not raised an issue that merits this Court's review. To be sure, we believe that the EPA's decision to grandfather within-formula stack height increases was a reasonable one, both under Section 123 and under the court of appeals' prior decision in *Sierra Club*, and it



should have been sustained by the court of appeals. The court's refusal to do so, however, does not present any legal issue that calls for resolution by this Court. Without repudiating the proper standards of review, the court determined that the EPA had not adequately assessed the degree of reliance by source owners on the EPA's varying stack height policies over the years (Pet. App. 36a-40a). That fact-specific ruling is not of general importance and does not conflict with any decision of this Court or of any other court of appeals.

5. Petitioners finally contend (88-61 Pet. 22-24) that the court of appeals ignored the doctrines of law of the case and *res judicata* by remanding for the agency to reconsider its treatment of within-formula stack height increases after that issue was allegedly settled in *Sierra Club*. Of course, the EPA agrees that agencies should not be required to relitigate the merits of previously adopted regulatory choices every time it engages in supplemental rulemaking after a remand. The present cases, however, do not call for this Court's elaboration or application of that doctrine, because the issue raised here was not explicitly raised or addressed in *Sierra Club*.

The pertinent issue in *Sierra Club* was whether the EPA could grandfather sources whose owners had relied on the 2.5H formula (prior to January 12, 1979), or whether the more restrictive regulatory formula of  $H + 1.5L$  had to be applied (719 F.2d at 467-468). Here, the issue is more comprehensively whether the agency may permissibly grandfather stack height increases commenced prior to October 11, 1983. Although the agency originally interpreted *Sierra Club*'s affirmance of the grandfathering provision as effectively encompassing the latter question (at least as to pre-1979 stack height increases), the decision is in fact somewhat ambiguous on this point. See *id.* at 459-460.



Thus, we cannot say that the court of appeals clearly erred in failing to find that litigation of the issue was foreclosed under the doctrines of law of the case and res judicata.

#### CONCLUSION

The petitions for a writ of certiorari should be denied.  
Respectfully submitted.

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\* The Solicitor General is disqualified in this case.